Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

DOREEN CETINER and ERKAN CETINER,

Petitioner,

- against -

CITY OF NEW YORK and NEW YORK CITY FIRE DEPARTMENT,

Respondents.

----------X

Index Number: 5955/07

Motion Date: 04/03/07

Motion Cal. Number: 3

Motion Seq. No. 1

The following papers numbered 1 to 9 read on this motion by petitioner to reargue and/or renew.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that the petition is decided as follows:

Motion by petitioner to reargue and/or renew her prior motion seeking leave to file a late notice of claim, pursuant to General Municipal Law §50 (e) (5), which motion was denied pursuant to the order of this Court issued on April 9, 2007, is granted to the extent of reargument.

With respect to that branch of the motion seeking renewal, petitioner's motion is denied since movant fails to articulate any new material facts that would support renewal. An application to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew and, for that reason, were not made known to the court (see, Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1st Dept 1992] lv to app dismissed in part and denied in part 80

NY2d 1005, reargument denied 81 NY 2d 782 [1993]; Foley v. Roche, 68 AD2d 558 [1st Dept 1979]; see also Martin Mechanical Corp. V. The P.J. Carlin Construction Co., 132 AD 2d 688 [2nd Dept 1987]).

To the extent that this Court overlooked the affirmation of Dr. Zitser annexed to plaintiff's reply, reargument is granted. Upon reargument, however, this Court adheres to its prior order.

In the first instance, it was improper of plaintiff's counsel to submit in his reply new evidence in support of the motion. The function of reply papers is to address arguments made in opposition to the motion and not to permit movant to introduce new evidence for the motion (see Merchants Bank of New York v. Gold Lane Corp., 28 AD 3d 266 [1st Dept 2006]). The submission of an affirmation in the reply in order to remedy the deficiency in the moving papers noted by the City in its opposition papers, to wit, that petitioners' allegation of physical incapacity as an excuse for her failure to timely serve a notice of claim was unsupported by a physician's affidavit, is unacceptable.

The contention of petitioner's counsel that since petitioner wanted to bring the order to show cause as soon as possible and that counsel was unable to contact Dr. Zitser to obtain his affirmation in time to include same in the order to show cause, which was signed by this Court on March 7, 2007, and for that reason, only Dr. Zitser's narrative report prepared previously in support of plaintiff's application for Social Security Disability benefits was included in the order to show cause, is disingenuous. Counsel made no mention of this fact in his affirmation in support of the application to serve a late notice of claim. Indeed, in his affirmation, counsel contends that the basis for plaintiff's inability to retain an attorney and file a timely notice of claim is demonstrated by the unaffirmed narrative report. Only when the City, in its opposition, argued that petitioner had not supported her claim of incapacity by medical proof in admissible form did petitioner's counsel submit a physician's affirmation in his reply.

Even were this Court to consider the affirmation of Dr. Zitser, dated March 28, 2007, said affirmation fails to show that petitioner was physically or mentally unable to retain counsel and cause a timely notice of claim to be served upon the City.

Dr. Zitser states that petitioner was consumed with the task of dealing with her injuries and that such could have caused her to wait one year before consulting with an attorney. However, Dr. Zitser does not state that petitioner was incapable of retaining an attorney and pursuing her legal remedies within the statutory 90-day period subsequent to the accident.

It has been held that a delay in serving a notice of claim is excusable '"[w]hen a claimant suffers from such a severe and disabling injury [that] it can be inferred that during the period of his hospitalization and for a substantial time thereafter, he will be more concerned with the condition of his health and learning to cope, both mentally and physically, with his disability, than with deciding whether, and if so, how to commence a lawsuit against the municipality within the statutorily prescribed time"' (Fahey v. County of Nassau, 111 AD 2d 214 [2nd Dept 1985], quoting Savelli v. City of New York, 104 AD 2d 943 [2nd Dept 1984]). However, in Fahey, the petitioner was hospitalized for 14 months immediately following the accident and subsequently was immobile for five months. Moreover, her treating physicians submitted affidavits wherein they opined that she was totally incapacitated from the date of the accident to the present time. Likewise, in the cases cited therein, the petitioner had similarly been hospitalized from between five and 14 ½ months followed by multiple months of recuperation at home.

In the instant case, no similar objective proof of incapacitation has been submitted. The accident herein occurred on February 18, 2006 and petitioner was hospitalized for 10 days – from February 19th through March 1st. She initially visited Dr. Zitser on July 21, 2006 and visited with him again in August, September, October and November 2006 and January 2007. Although Dr. Zitser opines that she was totally disabled, he fails to state, and the record fails to demonstrate, that she was incapacitated to an extent that would justify a delay of over nine months past the statutory 90-day period after the date of the accident.

Moreover, Dr. Zitser's affirmation fails to state a causal connection between plaintiff's injuries and the alleged negligent care. Dr. Zitser states that petitioner's injuries were caused by the traumatic injuries sustained as a result of her fall. While he offers generalizations that it would have been "good medical practice to stabilize her neck prior to transporting her to the hospital and that a reasonable health care provider should also know that failing to stabilize a neck injury is competent to cause worsening of an injury or even additional injury, depending on the circumstances," he does not state that the failure to stabilize petitioner's neck did, in fact, exacerbate her existing injury or cause additional injury. Even had he so stated, Dr. Zitser fails to state what the circumstances were in this case wherein the failure to stabilize petitioner's neck prior to transporting her would have caused her alleged injuries.

Therefore, petitioner has failed to set forth a reasonable excuse for her failure to cause a timely notice of claim to be

served upon the City.

In all other respects, petitioner has failed to demonstrate that this Court misapprehended any question of law or fact so as to warrant reargument.

Petitioner failed to demonstrate that respondent had actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter. The facts upon which the City's liability is predicated is not discernible from the FDNY prehospital care report and does not suggest a connection between the injuries reported therein and any negligence on the part of the EMS workers (see Doyle v. Elwood Union Free School District, 39 AD 3d 544 [2nd Dept 2007; Acosta v. City of New York, 39 AD 3d 629 [2nd Dept 2007]). Although Dr. Zitser opines that the recitation in the FDNY report that petitioner fell, lacerated her lip and was unable to use her hands to sign indicated to him that she had suffered a neck injury and it would have been good medical practice to stabilize her neck, such did not put the municipality on notice that petitioner had a claim. '"What satisfies the statute is not knowledge of the wrong, but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed"' (see Henriques v. City of New York, 22 AD 3d 847 [2nd Dept 2005], quoting Sica v. Board of Educ. of City of New York, 226 AD 2d 542, 543 [2nd Dept 1996]). There is nothing in the FDNY report itself that would have put the City on notice of an impending claim by petitioner.

Finally, it is the opinion of this Court that substantial prejudice would result if a late notice of claim were allowed at this juncture, over nine months after the expiration of the 90-day period.

Even were there no prejudice, it would be an abuse of discretion for this Court to grant the instant petition where petitioner has failed to demonstrate either that there was a reasonable excuse for her failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]). General Municipal Law §50-e would be rendered effectively meaningless if merely a lack of prejudice was alone sufficient to overcome all other factors.

Thus, this Court finds that it would be an improvident exercise of its discretion to grant petitioner's application for

leave to serve a late notice of claim without an adequate excuse by counsel for the delay, and absent the receipt by respondents of timely actual knowledge of the facts constituting petitioner's claim (Jasinski v. HB Ward Tech. Sch., 306 A.D.2d 347 [2d Dept. 2003]; Cordero v. County of Nassau, 2 A.D.3d 567 [2d Dept. 2003]; Gomez v. City of New York, 250 Ad 2d 443 [1st Dept 1998]).

Accordingly, although reargument has been granted, the Court adheres to its order issued on April 9, 2007.

Dated: June 6, 2007

KEVIN J. KERRIGAN, J.S.C.